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MONASKY'S TOTALITY OF CIRCUMSTANCES IS VAGUE – THE CHILD'S PERSPECTIVE SHOULD BE THE MAIN TEST

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ABSTRACT

After decades of confusion, the Supreme Court ruled on child custody in an international setting in *Monasky v. Taglieri*,[1] by attempting to establish the definition of a child's "habitual residence."[2] The Court held that a child's "residence in a particular country can be deemed 'habitual, however, only when her residence there is more than transitory.'"[3] Further, the Court stated that, '"[h]abitual' implies customary, usual, of the nature of a habit."'[4] However, the Supreme Court's ruling remains unclear.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction ("HCCAICA" or "The Hague Convention"), which is adopted in ninety-eight states and one regional organization,[5] provides that children must be returned to their habitual residence in the event of being wrongfully removed or retained in a

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[1] 140 S. Ct. 719 (2020).

[2] *Id.* at 723.

[3] *Id.* at 726.

[4] *Id.* (citing Black's Law Dictionary 1176 (5th ed. 1979)).

[5] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/en/states/hcch-members (last visited Sep. 15, 2021).

foreign country by one of their parents.[6] Courts struggle with the difficult task of determining a child's habitual residence.

[6] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter HCCAICA Convention].

I. INTRODUCTION

One view in the circuit split is that children lack the material capacity to decide where they will reside after their parents split.[7] However, the opposing view gives greater decision-making authority to the child by viewing the situation from the child's perspective.[8] Ultimately, the Supreme Court held that a child's habitual residence under the Hague Convention depended upon the totality of the circumstances specific to the case, not on the actual agreement between the parents on where to raise their child.[9] The Supreme Court's *Monasky* ruling is silent as to whether children should have a say about where they believe that their habitual residence is located, or if children do have a say, how much weight should be given to the child's opinion. The Court, instead, took a broad approach, which leaves little guidance for the lower courts. It is important for children to decide where their habitual residence is. Children are the best indicators of their habitual residence because their choice is based on where they feel most at home. The one exception to the child's preference should be when a child is an infant and lacks the ability to vocalize the location of his or her residence. In a case dealing with an infant, other factors should be given greater weight than the child's perspective.

In the United States, roughly "50% of American children will be witnesses to the break-up of their parent's marriage."[10] Further, teenagers struggling with their parents' divorce are said to be 300% more likely to need psychological help when compared to teenagers "who are in stable and intact nuclear families."[11] This Note will focus on a parent taking his or her child to a foreign nation, especially considering the high rate of divorce in the United States and the ease of international travel due to advanced transportation technology

[7] Gitter v. Gitter, 396 F.3d 124, 132 (2d Cir. 2005); Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004); Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004).
[8] Cohen v. Cohen, 858 F.3d 1150, 1154 (8th Cir. 2017).
[9] *Monasky*, 140 S. Ct. at 728.
[10] Jason Crowley, *The Psychological Effects of Divorce on Children (and How to Help Them Cope)*, SURVIVE DIVORCE, https://www.survivedivorce.com/divorce-effects-children (last visited Apr. 4, 2022).
[11] *Id.*

which make this issue particularly relevant.[12] To alleviate some of these frightening statistics, it is crucial to allow children to decide where they feel that their habitual residence is. This will give children a voice on where they are most comfortable living, which may relieve some of their stress.

The Court's decision in *Monasky* left the circuit courts with a loose guideline and great uncertainty regarding how to decide cases relating to a child's habitual residence. Ruling that a child's habitual residence is based on a totality of circumstances, the Court did not resolve the issue as to whether the child's perspective or the parent's last intent governs. The circuits that adopt the child's perspective view are going to continue to do so, and the circuits that adopt the parent's last shared intent will continue to adhere to that view. The lower courts cannot use *Monasky*'s "totality of circumstance" ruling as a guide because that ruling is not a bright line rule. Nor will either side of the circuit split be persuaded to rule in the alternative manner. Therefore, no change will occur from *Monasky*.

This Note has eight sections. Section II will address the background and importance of the Hague Convention and what it protects. Section III will discuss the major Supreme Court decision in *Monasky* from February of 2020.[13] Section IV will explore several cases from the circuits that focus on parental intent and those that focus on the child's perspective, as well as the Seventh Circuit – which implements both parental intent and the child's perspective to determine a child's habitual residence. Section V will consider the habitual residence of an infant and why the habitual residence should also be based on the child's perspective. Section VI will analyze the future problems caused by the ruling in *Monasky*, which gives little direction to lower courts in determining a child's habitual residence. Section VII will discuss why the vagueness of the *Monasky* ruling is troublesome. Finally, in Section VIII, this Note will conclude that the Supreme Court failed to make a proper ruling on the issue of habitual residence and has left alarming uncertainty for future cases.

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[12] *Preventing Children from Leaving the Country*, AYO & IKEN (Oct. 11, 2018)., https://www.18884mydivorce.com/child-custody-laws/preventing-children-from-leaving-the-country-passport-denial.

[13] *Monasky*, 140 S. Ct. at 719.

II. BACKGROUND AND IMPORTANCE OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The HCCAICA was drafted to deter parental child abduction at the international level.[14] It was especially directed towards the "unilateral and unauthorized retention or removal of children by someone close to them, such as parents, guardians, or family members."[15] Before the HCCAICA was finalized, the problem of parental child abduction was only dealt with on an individual level by each country that adopted the Convention.[16] Now, the Convention focuses on an international level. The Convention aims to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[17] The Convention's main objectives are to "[s]ecure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[18] Another purpose of the HCCAICA is to create remedies for international parental child abduction, even though there are very few.[19] Further, the HCCAICA prevents one party from gaining an advantage by preserving the status quo.[20] Preserving the status quo includes a mandatory return of a child to the state of the child's habitual residence.[21] However, that statement is not as simple as it may seem because habitual residence of a child was left undefined in the HCCAICA.

This ambiguity has caused great difficulty for circuit courts in recent years.[22] A court facing a case under the HCCAICA will typically address four questions to determine the location of a child's habitual residence.[23] First, the court will examine when the child's

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[14] HCCAICA Convention, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.
[15] Gitter v. Gitter, 396 F.3d 124, 129 (2d Cir. 2005).
[16] *See* HCCAICA Convention, *supra* note 6, art. 7.
[17] *Id.*
[18] *Id*.
[19] Friedrich v. Friedrich, 78 F.3d 1060, 1064 (6th Cir. 1996).
[20] *See* HCCAICA Convention, *supra* note 6.
[21] *Id.*
[22] Monasky v. Taglieri, 140 S. Ct. 719, 726 (2020).
[23] Redmond v. Redmond, 724 F.3d 729, 737 (7th Cir. 2013).

removal or retention occurred.[24] Next, the court will look to the state where the child habitually resided immediately before the removal or retention occurred.[25] Then, the court will decide whether the removal or retention was in breach of the petitioning parent's custody rights according to the state law of the child's habitual residence.[26] Lastly, the court will decide whether the petitioning parent employed his or her custody rights when the unlawful removal or retention took place.[27]

Since the Convention's purpose is to protect children who are being taken by a parent in the middle of their parents' divorce, the Convention's failure to define a child's habitual residence is problematic. Courts of most contracting nations evaluate two different factors when considering habitual residence: (1) the child's perspective; and (2) the parents' shared decision prior to the dissolution of their marriage.[28]

Prior to 2020, courts in the United States disagreed about which one of these factors is dispositive, and leading up to the *Monasky* decision, courts struggled for decades to interpret the phrase "habitual residence."[29] The *Monasky* Court did not define habitual residence; instead, the Justices held that, under the Hague Convention, a child's habitual residence depends on the totality of circumstances.[30] Thus, *Monasky's* overly broad ruling did not provide a clear direction to the lower courts.

III. THE CIRCUIT SPLIT PRIOR TO *MONASKY V. TAGLIERI*

A. "Parental Intent" Circuits

Prior to *Monasky*, courts including the Second Circuit,[31] Ninth Circuit,[32] and Eleventh Circuit Courts of Appeals[33] adopted the

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Morgan McDonald, *Home Sweet Home? Determining Habitual Residence Within the Meaning of the Hague Convention*, 59 B.C. L. REV. E-SUPPLEMENT 427, 429 (2018).
[29] *Id.* at 430.
[30] *Monasky*, 140 S. Ct. at 723.
[31] Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005).
[32] Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004).
[33] Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004).

perspective that "children normally lack the material psychological capacity wherewithal to decide where they will reside" when interpreting habitual residence.[34] These circuits also agree with the Ninth Circuit's reasoning in *Mozes*, which held that parental intent should be given greater weight when determining habitual residence of a child.[35]

In *Gitter v. Gitter*,[36] the Second Circuit held that "courts should begin their analysis of a child's 'habitual residence' for purposes of The Hague Convention by considering the relevant intentions of the child's parents."[37] This case arose after the plaintiff, an Israeli citizen, persuaded his wife, who also was born in Israel but left when she was an infant, to live in Israel for a year.[38] Gitter, his wife, and their young child moved to Israel in 2000.[39] The Gitters and their young son visited the United States, and, when visiting, Mrs. Gitter expressed her desire to move back to New York.[40] In 2002, Mrs. Gitter went to visit the United States with her son, but did not return to Israel.[41] In 2003, Mr. Gitter filed a petition seeking the son's return to Israel under the Hague Convention.[42] The District Court for the Eastern District of New York denied his petition and ruled that the son's habitual residence was in the United States.[43] The Second Circuit held that parental intent by itself cannot establish a child's habitual residence, but it is given a much greater weight than the child's perspective.[44] This court stated that it "specifically focus[es] on the intent of the person or persons entitled to fix the place of the child's residence, which is likely to be the parents in most cases."[45] Further, the court discussed that children normally lack the capacity to decide where their habitual residence is.[46] Most of what this court relied on when coming to a holding has now

[34] Mozes v. Mozes, 239 F.3d 1067, 1076 (9th Cir. 2001).
[35] *Id.*
[36] *Gitter*, 396 F.3d 124.
[37] *Id.* at 132.
[38] *Id.* at 128.
[39] *Id.*
[40] *Id.* at 129.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 133.
[45] *Id.* at 132.
[46] *Id.* at 133.

been overruled by the Supreme Court's recent decision in *Monasky v. Taglieri*.

Following the same rule, *Papakosmas v. Papakosmas*[47] was decided two years later by the Ninth Circuit Court of Appeals. In this case, Dimitris and Yvette were married in Las Vegas, Nevada in 1994, and subsequently resided in Los Angeles, California, where they had two children in 1995 and 1997, respectively.[48] Mr. and Mrs. Papakosmas owned and operated two hotels in Hollywood, California.[49] They also leased and operated a third hotel in Hollywood.[50] After seven years of living in California, in December of 2003, the Papakosmas family left California and went to Dimitris's birth country, Greece.[51]

The family arrived days before Christmas and spent the holidays with Dimitris's family.[52] After two weeks of staying with Dimitris's family, the Papakosmas family traveled three hours to Athens, where Dimitris had rented an apartment for them to stay in.[53] Soon after the family moved into this apartment, Dimitris and Yvette's relationship began to suffer.[54] Yvette's daughter told Yvette that Dimitris had a mistress from the United States who was also in Greece.[55] Further, Dimitris was incredibly controlling.[56] He controlled everything that the couple had, including the family's passports and business ventures.[57] Yvette claimed that she learned one of their hotels was sold the month before her trip to Greece, and did not know of the other hotel sale until the family arrived in Greece.[58] Yvette considered leaving Greece after learning of Dimitris's mistress, but she could not obtain her and her children's passports.[59] As a result, she sought help from the Embassy, which gave her plane tickets and

[47] 483 F.3d 617 (9th Cir. 2007).
[48] *Id.* at 619.
[49] *Id.* at 620.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 620.

passports for her and her children to travel to the United States on April 23, 2004.[60]

In August 2004, Dimitris filed an action under the HCCAICA requesting the children to be returned to Greece.[61] Subsequent to the evidentiary hearing, the District Court for the Central District of California denied Dimitris's petition.[62] The district court found that the couple moved to Greece on a conditional basis.[63] Moreover, the couple lacked shared intent to abandon their California residence.[64] Dimitris appealed the district court's ruling.[65]

The district court in *Papakosmas* focused heavily on the parents' last shared intent.[66] First, the district court determined whether "there was a settled intention to abandon their prior habitual residence."[67] The court answered this question in the negative.[68] Although the court relied heavily on the parents' shared intent, it also considered factors such as actual change in geography and a passage of time sufficient for acclimatization.[69] The court, citing *Mozes*, stated "[h]abitual residence is intended to be a description of a factual state of affairs, and a child can lose its habitual attachment to a place even without a parent's consent."[70]

Accordingly, even when the settled intent of a child's parents is not clear, "a district court should find a change in habitual residence if the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place."[71] Under this standard, the circuit court must accept the district court's historical or narrative facts unless they are deemed to be clearly erroneous.[72] The question of whether the parents' settled intention was to abandon their prior residence is a question of fact and the circuit court must defer to the

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[60] *Id.*
[61] *Id.*
[62] *Id.* at 621.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 622.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* (citing *Moses*, 239 F.3d at 1081).
[71] *Id.* (quoting Zenel v. Haddow, 1993 S.L.T. 975, 979 (Scot. 1st Div.)).
[72] *Id.* at 622-23.

district court.[73] The Ninth Circuit affirmed the district court's conclusion that the family's move to Greece was conditional, and it agreed with the district court that four months in Greece was insufficient to acclimatize the children to Greece.[74] This ruling is consistent with the reasoning that other courts have given when interpreting the language of the Hague Convention.[75]

The Eleventh Circuit Court of Appeals followed the same approach in *Ruiz v. Tenorio*.[76] In this case, Melissa Tenorio met Juan Ruiz when she was studying abroad in Mexico.[77] Juan was born in Mexico and resided there.[78] In May of 1992, Melissa found out she was pregnant, but she returned home to Minnesota where she lived and she birthed the child.[79] Juan went to live with Melissa at her parents' house in Minnesota and they got married.[80] In 1998, she gave birth to their second child and they moved into an apartment on their own.[81] The marriage was no longer a happy one, and in an attempt to save it, the couple decided to move to Mexico in 2000, after living in the United States for seven years.[82] At the time of the move, which was largely financed by Juan's father, Juan stated that the move was just for a trial period.[83] At first, the family lived with Juan's family but eventually moved into their own apartment due to tension between Melissa and Juan's mother.[84] Melissa traveled to the United States numerous times both alone or with her children, until May 2003, when she took her children to the United States and did not return.[85]

Juan filed a petition for wrongful removal under the Hague Convention in July 2003.[86] The District Court for the Middle District of Florida held a hearing in August 2003 and denied Juan's petition.[87] The district court held that Juan was unsuccessful in proving that the

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[73] *Id.*
[74] *Id.* at 628.
[75] *Id.* at 625.
[76] 392 F.3d 1247 (11th Cir. 2004).
[77] *Id.* at 1249.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1250.
[86] *Id.*
[87] *Id.*

children's habitual residence was in Mexico.[88] The district court relied heavily on the fact that the couple moved to Mexico in an attempt to save their marriage, with the idea that they would return to the United States if they were unsuccessful.[89] After only six months in Mexico, their relationship did not work out.[90] Further, the court held that the pair never shared intent to make Mexico the habitual residence of their children, but rather a temporary home during the time that the couple was trying to save their marriage.[91] Juan appealed the decision.[92]

The Eleventh Circuit agreed with both the Second and Ninth Circuits and held that the parents' settled intention is a crucial factor, but it cannot alone decide "habitual residence."[93] Like the other two circuits, the Eleventh Circuit considered additional factors aside from intent including the need for "an actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized."[94] Here, there was no shared intent because Juan and Melissa agreed to live together in Mexico for a probationary period.[95] A variety of objective factors further demonstrated Melissa's lack of intent to make her move to Mexico a permanent one.[96] Since the Eleventh Circuit concluded that the district court did not err in deciding that the parents had no shared intent, the court then began to look at relevant objective factors.[97] The Eleventh Circuit held that, although this case was a close case, it could not conclude that the objective facts in the instant case were sufficient to indicate that the habitual residence of the children in the United States was abandoned and changed to Mexico.[98]

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 1251.
[93] *Id.* at 1253.
[94] *Id.* (quoting *Mozes*, 239 F.3d at 1078).
[95] *Id.* at 1254.
[96] *Id.* ("Melissa's lack of intention to move permanently to Mexico: she retained bank accounts and credit cards in the United States; she had her American mail forwarded to an American address and not to Mexico; and she moved her nursing license to Florida shortly after she moved to Mexico.").
[97] *Id.*
[98] *Id.* at 1259.

B. "Child's Perspective" Circuits

The Third,[99] Sixth,[100] and Eighth Circuit courts[101] took a different approach to this issue. The Sixth Circuit Court of Appeals, in *Friedrich v. Friedrich*,[102] focused on habitual residence from the child's perspective, downplaying the parental intent.[103] The Third and Eighth Circuits were both influenced by the *Friedrich* holding to adopt the child's perspective approach in deciding habitual residence cases.[104] In *Friedrich*, the child, Thomas, was born in Germany.[105] Thomas's mother was an American servicewoman stationed in Germany and his father, Emanuel Friedrich, was a citizen of Germany.[106] Due to the nature of Mrs. Friedrich's occupation, Thomas spent a majority of the time in the physical custody of Mr. Friedrich and Mr. Friedrich's parents.[107] Thomas was two years old when his parents decided to separate.[108] Only one week after the separation, Mrs. Friedrich took Thomas from Germany to her family's home in Ohio.[109] Before Mrs. Friedrich departed for Ohio with Thomas, Mrs. Friedrich took Thomas to her army base for four days, where Mr. Friedrich visited him.[110] Mr. Friedrich was not informed that Mrs. Friedrich was taking their child to Ohio, and he sought the return of their child.[111]

The Sixth Circuit examined many factors of Thomas's life including the facts that: Thomas was born in Germany, Thomas's father is a German citizen, and Thomas's mother lived exclusively in Germany.[112] Due to these factors, the court held that Thomas's habitual residence was in Germany, and the court focused on Thomas's

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[99] Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995).
[100] Friedrich v. Friedrich, F.3d 1060 (6th Cir. 1996).
[101] Cohen v. Cohen, 858 F.3d 1150 (8th Cir. 2017).
[102] 983 F.2d 1396, 1401 (6th Cir. 1993).
[103] *Id.* at 1401.
[104] Feder v. Evans-Feder, 63 F.3d 217, 222 (3d Cir. 1995); Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003).
[105] *Friedrich*, 938 F.2d at 1398.
[106] *Id.*
[107] *Id.* at 1399.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 1401.

perspective to make this finding.[113] The court stated that the decision of the habitual residence should be determined by focusing on the child, "looking back in time, not forward."[114] The court explained why it focused on the past by reasoning that "[o]n its face, habitual residence pertains to customary residence prior to removal."[115] All of Mrs. Friedrich's arguments considered her future intentions to move to the United States; but, the court held that future plans to reside in the United States were irrelevant to the inquiry because the court looks to past experiences not future intentions.[116]

In 1996, Mrs. Friedrich appealed the case on two grounds.[117] For the purpose of this Note, only Mrs. Friedrich's second issue is relevant, which addresses the issue of, "[w]hen… a court [can] refuse to return a child who has been wrongfully removed from a country because return of the abducted child would result in a 'grave' risk of harm."[118] The "grave risk" defense can only be satisfied if there is clear and convincing evidence that the return of the child would subject him to physical or psychological harm.[119] The court was not convinced by this defense and held that Tommy was not at grave risk if he returned to Germany.[120]

The Eighth Circuit Court of Appeals decided how a child's habitual residence will be determined in *Cohen v. Cohen*[121] in 2017. Yaccov Cohen, an Israeli citizen, and Ocean Cohen, a dual-citizen of Israel and the United States, are the parents of O.N.C., who was born in Israel in 2009.[122] For the first three years of O.N.C.'s life, he lived in Israel until Yaccov and Ocean decided that Ocean and O.N.C. would move to St. Louis.[123] Yaccov was just released from prison and was unable to leave Israel for a probationary period, but planned to move to St. Louis after he paid his fines, penalties, and restitution.[124] O.N.C.

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[113] *Id.* at 1402.
[114] *Id.* at 1401.
[115] *Id.*
[116] *Id.*
[117] Friedrich v. Friedrich, 78 F.3d 1060, 1063 (6th Cir. 1996).
[118] *Id.*
[119] *Id.* at 1067.
[120] *Id.* at 1069.
[121] 858 F.3d 1150 (8th Cir. 2017).
[122] *Id.* at 1151.
[123] *Id.*
[124] *Id.*

and Ocean then moved to St. Louis and started a new life.[125] O.N.C. was enrolled in school and speech therapy while Ocean secured employment and did all things necessary to start a new life in the United States, including purchasing a vehicle and renting an apartment.[126] Yaccov and Ocean living separately caused their relationship to deteriorate, and in 2014, Ocean filed for divorce.[127]

Following the divorce filing, Yaccov filed a request with the Israeli Ministry of Justice to have O.N.C. returned to Israel under the Hague Convention.[128] Yaccov urged the court to adopt the standard applied in the Second Circuit, among others, which gives dispositive weight to parental intent.[129] The *Cohen* court rejected this view.[130] The petitioner must demonstrate by a preponderance of evidence that "the child has been wrongfully removed or retained within the meaning of the Convention" in order to successfully state a case for the child's return.[131] The key question in a case dealing with the Convention is "whether a child has been wrongfully removed from the country of its habitual residence or wrongfully retained in a country other than of its habitual residence."[132] In *Cohen*, the court focused on the determination of the child's habitual residence.[133] The Eighth Circuit explained that the "retention of a child in the state of its habitual residence is not wrongful under the Convention."[134] The Eighth Circuit agreed that the child's habitual residence was in the United States, and therefore held that the District Court for the Eastern District of Missouri did not err in its decision.[135]

Additionally, the Eighth Circuit earlier held in *Silverman v. Silverman*[136] that a child's habitual residence is determined as of the time immediately before the removal or retention and depends on past experiences of the child instead of future intentions of the parents.[137]

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[125] *Id.*
[126] *Id.* at 1153.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 1154.
[130] *Id.*
[131] *Id.* at 1153 (citing 22 U.S.C. § 9003(e)).
[132] *Id.* (quoting Barzilay v. Barzilay, 600 F.3d 912, 920 (8th Cir. 2010)).
[133] *Id.*
[134] *Id.*
[135] *Id.* at 1153-54.
[136] 338 F.3d 886 (8th Cir. 2003).
[137] *Id.* at 897-98.

The court in *Silverman* determined that a habitual residence encompasses a form of settled purpose.[138] To establish a settled purpose, a family must have an adequate degree of continuity in a specific location, but there is no need for the family to stay in a new location forever.[139] Various factors, including the family's change in geography, personal possessions and pets, and period of time can determine a family's settled purpose.[140] Moreover, the settled purpose should come from the "child's perspective, although parental intent can also be taken into account."[141] In *Silverman*, the Eighth Circuit stated that the lower court should have looked at the children's habitual residence at the time their mother took them from Israel to the United States.[142] The Eighth Circuit noted that the lower court should keep in mind that the children can only have one habitual residence.[143] Further, the Eighth Circuit stated that the lower court "should have determined the degree of settled purpose from the children's perspective."[144] The Eighth Circuit seems to find that the settled purpose gives more credibility to the child's perspective than it does to parental intent.[145]

In contrast, the Third Circuit Court of Appeals held in *Feder v. Evans-Feder*,[146] that "[a] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."[147] In *Feder*, Edward Feder claimed that Melissa Evans-Feder wrongfully retained their son in the United States and petitioned for their son to be returned to Australia.[148] The couple moved to Australia in October of 1993, when Mr. Feder took a job in Australia and the couple put their Pennsylvania home up for sale.[149] By spring of 1994, their relationship started to deteriorate, and Mrs. Feder stated that she was unhappy and wanted to move back to the

[138] *Id.* at 898.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] 63 F.3d 217 (3d Cir. 1995).
[147] *Id.* at 224.
[148] *Id.* at 218.
[149] *Id.* at 218-19.

United States.[150] Mrs. Feder, knowing that Mr. Feder would not agree to let her take their son to the United States to live with her, told him they were going to visit Mrs. Feder's parents in Pennsylvania.[151] Mrs. Feder and the child never returned to Australia.[152]

The District Court for the Eastern District of Pennsylvania concluded that the United States was the child's "habitual residence."[153] The Third Circuit reversed that decision and held that Australia was the child's "habitual residence."[154] The court declared that Mrs. Feder's retention of her son was "wrongful within the meaning of The Hague Convention."[155] The Third Circuit looked at factors such as the length of time that the child had lived in Australia, the fact that he attended preschool in Australia at the time his mother took him to the United States, and the fact that the parents enrolled their son in kindergarten for the upcoming school year in Australia.[156] Even though the child only lived in Australia for six months, the court determined that six months was a significant amount of time for a four-year-old.[157] The court also noted that the child's residence immediately prior to the wrongful retention was in Australia.[158]

C. The Combination of Approaches

In 2013, the Seventh Circuit Court of Appeals in *Redmond v. Redmond*[159] attempted to reconcile the two approaches in deciding where a child should reside and emphasized that a habitual residence should be a "practical, flexible, factual inquiry."[160] The court noted that there should not be a fixed test in place to determine "habitual residence."[161] This approach to determining habitual residence is similar to the totality of circumstances approach that the Supreme

[150] *Id.* at 219.
[151] *Id.* at 220.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* at 224.
[157] *Id.*
[158] *Id.*
[159] 724 F.3d 729 (7th Cir. 2013).
[160] *Id.* at 732.
[161] *Id.*

Court used in *Monasky v. Taglieri*.[162] The Seventh Circuit analyzed both views and concluded that "all circuits [shall] . . . consider *both* parental intent *and* the child's acclimatization."[163] The only difference between the split ruling of the jurisdictions is in their emphasis that is given to the two weighted factors, parental intent and perspective of the child.[164] The Seventh Circuit stated that it has not had the opportunity to resolve how to balance the parents' intent and the child's perspective.[165]

IV. *MONASKY V. TAGLIERI* OVERRULES *MOZES V. MOZES* NINETEEN YEARS LATER IN 2020

Prior to *Monasky*, the habitual residence was determined using the framework established in *Mozes v. Mozes*.[166] Arnon Mozes and Michal Mozes, both Israeli citizens, lived in Israel with their four children ranging from seven to sixteen years old.[167] All the children lived in Israel until 1997.[168] In April of 1997, with Arnon's approval, his wife and the children went to California, while he stayed in Israel.[169] Both parents thought it would be beneficial to enroll the children in school in America to learn the English language, and they agreed to have the family live there for fifteen months.[170] Arnon visited California on numerous occasions and paid all the family expenses both in Israel and California.[171]

This case was initiated when Michal Mozes filed for a dissolution of her marriage to Arnon Mozes.[172] In addition to the dissolution of marriage, Michal filed for a temporary restraining order against Arnon to prevent his removal of the children from southern California.[173] Arnon then filed a petition, seeking to have the children

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[162] Monasky v. Taglieri, 140 S. Ct. 719, 724 (2020).
[163] *Redmond*, 724 F.3d at 746.
[164] *Id.*
[165] *Id.*
[166] 239 F.3d 1067 (9th Cir. 2001), *overruled by* Monasky v. Taglieri, 140 S. Ct. 719 (2020).
[167] *Id.* at 1069.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

returned to Israel under the Hague Convention.[174] The oldest child elected to return to Israel and did so by mutual agreement of both parents.[175] The District Court for the Central District of California denied Arnon's petition for the three younger children to be returned to Israel.[176] Arnon appealed the lower court's decision.[177]

The district court declared the children's habitual residence as the United States; however, the Ninth Circuit Court of Appeals reversed the lower court's decision and remanded the case to determine whether there was a wrongful retention of the children in the United States.[178] If there was a wrongful retention, the children would return to Israel with their father.[179]

In *Mozes*, the Ninth Circuit concluded that "a settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one," but there are additional factors.[180] The main issue the *Mozes* court confronted was, "[w]hose settled intention determines whether a child has abandoned a prior habitual residence?"[181] The court in *Mozes* explained that an "obvious" response to that question would be to use the child's intent.[182] The child's intent would be most effective because the child would know where he or she feels most at home.[183]

However, the Ninth Circuit noted that there is a potential problem with using the child's intent.[184] The court held that children normally lack the material and psychological capacity to decide where they should reside.[185] Therefore, the parents' intentions are relevant in deciding the child's habitual residence.[186] Under the *Mozes* framework, if the child cannot decide where to live due to lack of capacity, the court's next step is to look at the parents' intent.[187] Two

[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 1071, 1084.
[179] *Id.* at 1086.
[180] *Id.* at 1076.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.* at 1078.

factors are considered when determining parental intent.[188] First, the parental intent requires "an actual change in geography," and second, it requires enough time to pass to enable the child to become accustomed to the new area.[189]

The *Mozes* case is now abrogated by the recent case, *Monasky v. Taglieri*.[190] *Monasky* addressed the standard for determining the habitual residence of a child as well as the standard to review that finding on appeal.[191] Petitioner, Michelle Monasky, was a U.S. citizen who brought her infant daughter to the United States from Italy after Michelle suffered from continuous abuse by her husband, Domenico Taglieri.[192] Monasky and Taglieri were married in 2011 and relocated to Italy two years later, with no intent to move back to the United States.[193] The couple's marriage started to deteriorate before the birth of their daughter, and the relationship continued to worsen after she was born.[194] In 2015, Monasky vocalized her desire to divorce Taglieri and her desire to move back to the United States with their infant daughter.[195] Then, Monasky took her two-month-old daughter and moved to the United States.[196]

Taglieri successfully petitioned the District Court for the Northern District of Ohio for the return of the infant to Italy under the Hague Convention.[197] The Sixth Circuit Court of Appeals affirmed the district court's decision.[198] Both courts reasoned that an infant is too young to get "acclimated to her surroundings" and both courts looked at the parents' last shared intent.[199] Both the district court and the Sixth Circuit determined that, even if Monasky was allowed to unilaterally change the infant's "habitual residence," Monasky ran away to the United States and had no previous definitive plans to raise their daughter there.[200] The Sixth Circuit reviewed the district court's

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[188] *Id.*
[189] *Id.* (citing Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993)).
[190] 140 S. Ct. 719 (2020).
[191] Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).
[192] *Id.*
[193] *Id.* at 724.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 723.
[199] *Id.* at 724.
[200] *Id.* at 725.

decision for clear error, and found no error in the holding.[201] The Sixth Circuit rejected Monasky's argument that the lower court erred in its decision that the child's habitual residence was in Italy because the parties never had a "'meeting of the minds' about their child's future home."[202] Monasky successfully petitioned for certiorari.[203] The Supreme Court of the United States granted certiorari to "clarify the standard for habitual residence."[204]

The Court analyzed the phrase "habitual residence."[205] To do this, the Court first broke down the two words into separate definitions.[206] According to Black's Law Dictionary, a child "resides" where he or she lives.[207] A child's residence can only be deemed "habitual" when her residence is more than transitory; furthermore, the word "habitual" implies "customary, usual, of the nature of habit."[208] The Court, in this definitional analysis, also noted that the Hague Convention's text alone does not affirmatively tell us what makes a child's residence sufficient to be categorized as "habitual."[209] The Justices concluded that the term "habitual" suggests a fact-sensitive inquiry, which aided them in reaching their holding.[210]

Justice Ginsburg, writing for the majority in this case, stated that, "[a] child's habitual residence depends on the totality of the circumstances specific to the case."[211] It is not based on categorical requirements such as an actual agreement between the parents.[212] The Court stated that although the Hague Convention does not define "habitual residence," the Convention indicates that it is meant to be interpreted as where a child is at home.[213] Further, the Court held that there are no dispositive indicators of an infant's habitual residence.[214] Alternatively, the Court declared that a wide variety of facts shall be

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[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.* at 726.
[206] *Id.*
[207] *Id.* (citing Black's Law Dictionary 1176 (5th ed. 1979)).
[208] *Id.* (citing Black's Law Dictionary 1176 (5th ed. 1979)).
[209] *Id.*
[210] *Id.*
[211] *Id.* at 723.
[212] *Id.* at 726.
[213] *Id.*
[214] *Id.*

considered, other than an actual agreement, because surrounding facts will enable a trier to determine if the infant's residence has the quality of being "habitual."[215] The Court did not state specific factors for determining the totality of circumstances; instead it emphasized that the determination of habitual residence is a fact-sensitive inquiry.[216]

The Supreme Court in *Monasky* did not agree with the court in *Mozes*. The court in *Mozes* gave greater weight to the shared intentions of the parents; meanwhile, in *Monasky*, the Justices held that the decision of a child's habitual residence is to be determined by a totality of circumstances.[217]

V. HABITUAL RESIDENCE OF INFANTS

Children ages five to seventeen should certainly be able to decide where they would like to reside once their parents split, and one parent moves internationally. Children who fall within the grade school age and above category are capable of determining their "habitual residence;" therefore, the perspective of children in this age range should prevail and their preferences should trump all other circumstances.[218] On the other hand, it is a difficult task to determine the appropriate method to establish the habitual residence for newborns,[219] infants,[220] and toddlers.[221] Regarding children of this age bracket, the courts should adopt a view that mirrors the child-centric standard used for children ages five to seventeen. While it is much harder to determine a baby's habitual residence, the same standard should apply because it is fair to both parents and in the best interest of the child. Parents should prioritize where the baby feels comfortable to provide the child with an environment in which to thrive and succeed.

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[215] *Id.* at 729.
[216] *Id.* at 726.
[217] *Id.*
[218] Petronella Grootens-Wiegers et al., *Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects*, BMC PEDIATRICS (May 8, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5422908.
[219] Heather Corley, *Differences Between a Baby, Newborn, Infant & Toddler*, VERY WELL FAM. (Jan. 20, 2020), https://www.verywellfamily.com/difference-between-baby-newborn-infant-toddler-293848 (newborns usually refer to a baby from birth to two months).
[220] *Id.* (Infants are children anywhere from birth to one year.).
[221] *Id.* (Baby can be used to refer to any child from birth to four years old.).

The child in *Delvoye v. Lee*[222] was a two-month-old newborn.[223] In this case, the parents met in New York in early 2000 and began a romantic relationship.[224] At the time, the petitioner, father, lived in Belgium and respondent, mother, lived in New York.[225] In August of 2000, the petitioner moved in with the respondent.[226] Shortly after, in September, the couple found out they were expecting a baby.[227] A dispute arose as to where the baby should be born, and financially, it was a better choice for the respondent to give birth in Belgium.[228] In order to deliver the baby in Belgium, the respondent received a three-month visa and only packed one or two suitcases, because she left all of her other belongings in her New York apartment.[229] She also did not renew her visa once it expired.[230] By the time that the couple's daughter was born, in May of 2001, the parties' relationship had terminated.[231] The father consented to the mother returning to the United States with the child in July of 2001.[232] The father traveled to New York several times to see his baby and tried to reconcile, albeit unsuccessfully, with the baby's mother.[233] The father then filed a petition to have his baby sent back to Belgium under the HCCICA.[234] The District Court for the District of New Jersey denied the father's request and he appealed to the Third Circuit Court of Appeals.[235]

On appeal, the Third Circuit Court of Appeals focused on the issue of whether the baby was a habitual resident in Belgium when he was removed to the United States.[236] The *Delvoye* court faced a troubling issue of whether a very young infant can even acquire a "habitual residence."[237] When addressing the issue, the court relied on

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[222] 329 F.3d 330 (3d Cir. 2003).
[223] *Id.* at 332.
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*

its prior holding in *Feder-Evans*.[238] In *Feder-Evans*, the court held that "[a] child's habitual residence is the place where he . . . has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."[239]

The Third Circuit adhered to its precedent and used the same standard for determining where an infant's habitual residence is located.[240] The court looked to an English court and an Australian court for assistance.[241]

> An English court has said: "The habitual residence of the child is where it last had a settled home which was in essence where the matrimonial home was." And an Australian court has said that: "A young child cannot acquire habitual residence in isolation from those who care for him. While 'A' lived with both parents, he shared their common habitual residence or lack of it."[242]

Both the English and Australian courts provided insightful definitions of habitual residence for infants from their countries' views, which assisted the Third Circuit in reaching a decision. Both definitions provide a bright-line rule to determine the child's habitual residence, which would be useful in the American court system. The English court uses the phrase "matrimonial home."[243] Problems may arise when one party argues that the home is a temporary matrimonial dwelling. The court will have to assess the evidence and decide if the parties intended for the residence to be permanent.

If a matrimonial home exists, then both parents share a settled intent to reside there, and it simply calls for application of the Hague Convention to determine the child's "habitual residence."[244] However, this case is more difficult because the plain "fact that conflict has developed between the parents" does not discontinue a child's habitual residence, if it is already in existence.[245] The child may never adopt a

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[238] *Id.*
[239] *Id.* (quoting *Feder*, 63 F.3d at 224).
[240] *Delvoye*, 329 F.3d at 333.
[241] *Id.*
[242] *Id.* (quoting Dickson v. Dickson, 1990 SCLR 692; Re F (1991) 1 F.L.R. 548, 551).
[243] *Id.*
[244] *Id.*
[245] *Id.*

habitual residence if the parental conflict arises at the same time as the child's birth.[246] The court explained that parental conflict at the time of the child's birth does not result in the child automatically assuming the habitual residence of his or her mother.[247] In *Delvoye*, the petitioner traveled to Belgium to deliver the baby for financial reasons and only intended to stay in Belgium for a short period of time.[248] She lived out of a suitcase while in Belgium; meanwhile, she kept her apartment in New York where she left most of her belongings.[249] Therefore, there was not enough of a common purpose between the parents for Belgium to become their "habitual residence."[250]

The facts in *Delvoye* are distinguishable from those in *Nunez-Escudero v. Tice-Menley*,[251] decided by the Eighth Circuit Court of Appeals.[252] In *Nunez-Escudero*, the father, a Mexican citizen, alleged that the mother of his infant son wrongfully removed his child from Mexico and petitioned for his return.[253] Before the petitioner and respondent separated, they were married and lived together in Mexico for nearly a year before their son was born.[254] Two months after the baby was born, the mother, a citizen of the United States, left Mexico with her infant son and returned to Minnesota where she previously resided with her parents.[255] In order for the child to be returned to Mexico, the father needed to prove that the child's mother removed him from his "habitual residence."[256] If, by a preponderance of the evidence, the father was able to demonstrate that the child's habitual residence was in Mexico, then the mother would have had the burden to show by clear and convincing evidence that an exception exists for her case.[257] If the mother was able to meet her burden, then the child

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[246] *Id.*
[247] *Id.*
[248] *Id.* at 334.
[249] *Id.*
[250] *Id.*
[251] 58 F.3d 374 (8th Cir. 1995).
[252] *Id.* at 375.
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* (Article 13 of the Hague Convention provides two exceptions for when "the judicial or administrative authority of the requested State is not bound to order the return of the child." These exceptions must be proved by clear and convincing evidence. The first exception is if "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the

would have remained in the United States.[258] The District Court for the District of Minnesota held that the mother successfully established an exception by clear and convincing evidence, but the father appealed that decision.[259]

The father argued on appeal that the district court only considered evidence relevant to a custody arrangement and failed to apply the Hague Convention.[260] He further argued that "a child can only be exposed to a grave risk of harm under Article 13b if the habitual residence cannot protect the child."[261] The Eighth Circuit found that the district court incorrectly assessed the gravity of risk to the child when evaluating the effects of a possible separation of the child from his mother.[262]

The mother in this case offered some evidence to show that the baby could be subject to a "grave risk of physical or psychological harm or be placed in an intolerable situation," but the court held that it was insufficient to meet the exception because it was too general.[263] Further, the evidence focused primarily on the problems between Tice-Menley and Nunez, and Tice-Menley did not offer any evidence of how the child would be at grave risk as a result of the separation.[264]

Ultimately, the Eighth Circuit rejected the father's argument, and remanded the case for further proceedings.[265] The court provided that "in determining grave risk, Article 13 requires the court to evaluate the surroundings to which the child is to be sent and basic personal qualities of those located there."[266] On remand, the mother, by clear and convincing evidence, was required to prove that the return of her son to Mexico would subject him to "a grave risk of harm or otherwise place him in an intolerable situation."[267] Additionally, the Eighth

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time of removal or retention or had consented to or subsequently acquiesced in the removal or retention." The second exception is if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.").

[258] *Id.*

[259] *Id.* at 375.

[260] *Id.* at 376.

[261] *Id.*

[262] *Id.* at 377.

[263] *Id.*

[264] *Id.* at 377.

[265] *Id.*

[266] *Id.* (Currier v. Currier, 845 F. Supp. 916, 923 (D.N.H. 1994)).

[267] *Id.* at 378.

Circuit held that it could not affirm the district court's ruling on an alternative ground that the father "failed to establish Mexico as the child's habitual residence."[268] The Eighth Circuit noted that the lower court must make a ruling on the habitual residence of the child first.[269]

VI. FUTURE PROBLEMS FROM THE *MONASKY* CASE

Monasky is an impractical ruling because it provides insufficient guidance to lower courts. The Supreme Court should have adopted the child's perspective, which should be determined by objective factors. There needs to be a bright-line rule. Families that are struggling with divorces are being hurt by this ruling, especially the children involved in habitual residence cases. Children and parents will undergo a great amount of stress due to the Court's failure.[270] Further, this ruling will create financial burden for parents.[271]

Children do not choose for their parents to divorce, but, as a result of the divorce, countless numbers of children are left hurt and vulnerable.[272] There are devastating effects of divorce on both parents and children which tend to weaken the parent-child relationship.[273] In many cases, a child's life completely changes when parents get a divorce, and the transition can be very difficult for a child.[274] Frequently in divorce cases, the child is forced to move; moreover, the child has to live with one parent while having visitation with the

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[268] *Id.*

[269] *Id.* at 379.

[270] Amy Morin, *The Psychological Effects of Divorce on Children*, VERY WELL FAM. (Feb. 21, 2021), https://www.verywellfamily.com/psychological-effects-of-divorce-on-kids-4140170.

[271] Timothy Weinstein, *The Financial Cost of Child Abduction*, BRING SEAN HOME FOUND., (last updated December 2013), http://bringseanhome.org/resources/the-left-behind-parent/the-financial-cost-of-child-abduction.

[272] Lori Rappaport, *Understanding Children's Reactions to Divorce*, GROWING UP GREAT (last visited Apr. 6, 2021), http://www.growingupgreat.com/html/handouts/divorce.htm.

[273] Sylvia Smith, *Challenges that Children of Divorced Parents Face in their Adulthood*, MARRIAGE (June 12, 2020), https://www.marriage.com/advice/divorce/challenges-that-children-of-divorce-face-in-their-adulthood ("Resent of parents can be a facet of the Adult Child of Divorce's relationship with their parents.").

[274] D'Arcy Lyness, *Helping Your Child Through a Divorce*, KIDSHEALTH (Jan. 2015), https://kidshealth.org/en/parents/help-child-divorce.html.

other.[275] Although divorced parents in many instances decide to have joint custody of the children, the total number of custodial parents in the United States is approximately 12.9 million, and 79.9% of custodial parents in the United States are mothers.[276] A custodial parent is a parent who, by court order "has either sole or primary physical custody of a child, and is the parent the child spends most of the time with."[277] Shockingly, only forty percent of the states in the United States aim to give children equal time with both parents.[278] In cases dealing with "habitual residence," when one parent moves to another country, this forced move for the child makes it even more devastating for families.[279]

If the Court adopted the child's perspective rule, deciding the child's habitual residence would be fair and would accurately depict what the child wants. Courts would look at where the child feels at home. Further, if the child is speaking age, a judge or an attorney for the child can have a conversation with the child directly. Although it may be devastating news for a parent to know that his or her child wants to live in one place instead of the other, at least the parent can walk away knowing that the child is happy and feels at home. However, the court system remains confused. The same case with the same facts decided in one jurisdiction could have a different result if heard in another jurisdiction. Due to the potential severity of this issue, there needs to be a uniform method for courts to decide habitual residence cases. A uniform procedure would alleviate stress for all parties involved and reduce the financial burdens of going to court and the subsequent appeals.

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[275] Lili A. Vasileff, *Relocating with Children After Divorce*, FIN. PLAN. ASS'N (Jan. 27, 2012), https://www.plannersearch.org/financial-planning/relocating-with-children-after-divorce.

[276] Marija Lazic, *35 Divisive Child Custody Statistics*, LEGAL JOBS (June 21, 2021), https://legaljobs.io/blog/child-custody-statistics.

[277] Melissa Heinig, *What is a Custodial Parent?*, DIVORCE NET, https://www.divorcenet.com/resources/what-is-a-custodial-parent.html (last visited Nov. 11, 2021).

[278] Lazic, *supra* note 276.

[279] Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. OF MATRIM. LAW. 119, 119 (1998).

VII. THE SUPREME COURT'S RULING OF "TOTALITY OF CIRCUMSTANCES" IS VAGUE AND TROUBLESOME

The Supreme Court granted certiorari in *Monasky v. Taglieri* to clarify the standard for habitual residence for minors and address the different opinions among the circuit courts.[280] The Supreme Court particularly addressed *Mozes v. Mozes* and *Redmond v. Redmond* and analyzed their different approaches. In *Mozes*, the court placed greater weight on the shared intentions of the parents; meanwhile, the court in *Redmond* rejected the "rigid rules, formulas, or presumptions."[281] Ultimately, the Court held that the child's habitual residence depends on the particular circumstances of each case, and each case is different.[282] The Court stated that the habitual residence of a child is a mixed question of law and fact; therefore, a bright line rule is not appropriate.[283] The Supreme Court's vague ruling does not change the circuit split and leaves the jurisdictions divided. The Supreme Court could have avoided this entire problem by taking a clear stance on the issue and applying the correct standard. The vagueness of the Supreme Court's previous ruling creates great uncertainty and fear for parents knowing that their child's fate could be entirely different if the case were tried in another circuit. As such, the country needs a uniform rule on this issue.

The Supreme Court failed by not taking the view that habitual residence should be determined from the child's perspective. The Court in *Monasky* held that a child's habitual residence was not based on an actual agreement between the parents on where to raise the child, but instead depended on the totality of circumstances.[284] This decision does not seem to take the children's perspective into account at all. A child's life is turned upside down when his or her parents split up, which is why the child's best interest should be determined based on the child's perspective in determining where the child wishes to reside.[285] The least that the Court can do is decide the habitual residence from the eyes of the child. In *Cohen*, the Eighth Circuit made its determination by focusing on different factors including where the

[280] Monasky v. Taglieri, 140 S. Ct. 719, 720 (2020).
[281] *Id.* at 724 (quoting *Redmond*, 724 F.3d at 746).
[282] *Id.* at 728.
[283] *Id.*
[284] *Id.*
[285] *See supra* text accompanying notes 7-8.

child went to school, where his pediatrician was, if he had extended family or friends in the area, if he participated in activities, and what language the child mostly spoke.[286] The Eighth Circuit adopted the proper approach.

The Court did not provide guidance to the lower courts about what to do in close cases. The Court could have helped lower courts if it clarified whether courts should look towards parental intent or the child's perspective in situations when courts are struggling to determine the child's habitual residence. If the Supreme Court provided a bright line rule, it would have been much easier for the courts to make uniform decisions. Due to this uncertainty, nothing will change in the circuit split. Considering the high rate of divorce and the ease of international travel, wrongfully retained or not, habitual residence of a child should be decided from the child's perspective and based on objective factors.

The Court should have used the opportunity it was recently granted in *Monasky* to explain the changing times. A child can travel at ease when visiting the parent he or she does not live with, and the parent can travel to where the child is. Furthermore, advanced technology allows children to see their parents via Facetime or Zoom. With the ease of travel and advanced technology that allow children to virtually see their parents, the children should decide where their habitual residence is. In modern times, it is easy to stay connected with parents and loved ones via the Internet and cell phones.[287] The Hague Convention, along with many cases regarding habitual residence of a child, dates back prior to the existence of Facetime and Zoom.[288]

VIII. CONCLUSION

The Supreme Court had decades to fix the issue of determining a child's habitual residence under the Hague Convention, but when it

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[286] *Cohen*, 858 F.3d at 1154.

[287] Vinay Prajapati, *How Technology Helps to Improve Communication?*, TECHPREVUE (Jan. 26, 2021), https://www.techprevue.com/technology-helps-improve-communication (although social media platforms such as Facetime and Zoom are not full replacements for interactions between parents and children, it is much better than no alternative. Human contact will always trump technology, but sometimes that is not feasible. For example, during the COVID-19 pandemic, using technology may be the only way to see many family members and friends.).

[288] Martyn Casserly, *Facetime vs Zoom*, MACWORLD (May 14, 2020), https://www.macworld.co.uk/news/facetime-vs-zoom-3787655.

finally had the opportunity in 2020, the justices issued an ineffective ruling. The Court should have given greater weight to the child's perspective, considering the fact that it is the child's life that is being completely altered due to their parents' split, especially when a parent moves out of the country.

Instead, the Third, Sixth, and Eighth Circuits have issued the correct rule to determine the habitual residence of a child: the child-centric focus that the Supreme Court should have adopted. The Supreme Court's decision that a child's habitual residence should be determined based on the "totality of circumstances" is overbroad and will have little effect on future decisions in the lower courts. Due to this overbroad rule, the Supreme Court sadly missed the opportunity to effectively rule on this issue. Through this missed opportunity, the Court also failed to provide enough information to resolve the circuit split which will continue to haunt the lower courts in their future decisions for years to come. As a result, the confusion and chaos will only continue.